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FOR ARGUMENT

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF

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Pursuant to Rule 41(3) of the Rule of this Court, the petitioner files this his reply brief.

I.

Respondent argues that "both the trial judge and the prosecutor seemed willing to accept any juror who could take the [section 12.31(b)] oath to answer truly the questions, even though such a juror might properly be excluded under the Witherspoon doctrine." Brief for Respondent, 57. This, in respondent's view, section 12.31(b) is "a means of rehabilitating jurors who might otherwise have been excluded under Witherspoon . . . " Id. at 58.

This argument is patently false, both as a matter of Texas law and as a matter of fact based upon analysis of the record in this case.

A.

The Texas Court of Criminal Appeals has repeatedly held that venire members who meet the Witherspoon test for exclusion for cause may be dismissed from jury service without any inquiry under §12.31(b). In Brock v. State, 556 S.W.2d 309, 313 (Tex.Crim.App. 1977), that court held:

> . . . where prospective jurors are properly disqualified under the Witherspoon rule, the fact they may or may not have been disqualified or even questioned under V.T.C.A., Penal Code, §12.31(b), is of no consequence. Battie v. State, 551 S.W.2d 401 (Tex.Crim.App. 1977); Whitmore v. State, [570 S.W.2d 889 (Tex.Crim.App. 1976)]; Smith v. State, 540 S.W.2d 693, 698 (Tex.Crim.App. 1976). Cf. Moore v. State, 542 S.W.2d 664, 672 (Tex.Crim.App. 1976). A prospective juror may be disqualified under either said §12.31(b) or Witherspoon or both.

Again, in Franklin v. State, Tex.Crim.App., No. 57348, May 24, 1978, slip op. at 17, rehearing granted and judgment reversed on other grounds, 588 S.W.2d 920 (Tex.Crim.App. 1979), the court stated:

> In a capital murder case, a prospective juror may be disqualified under Witherspoon, Sec. 12.31(b), or both. Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977). If a prospective juror is disqualified under Witherspoon, the fact that he may or may not have been disqualified or even questioned under Sec. 12.31(b), supra, is of no consequence. Brock v. State, supra.

And again, in Bodde v. State, 568 S.W.2d 344, 348 (Tex.Crim.App. 1978):

> In a capital murder case, a prospective juror may be disqualified under either Witherspoon or Sec. 12.31(b) or both. Franklin v. State, supra; Brock v. State, supra; Moore v. State, supra. A prospective juror who is disqualified under Witherspoon need not be disqualified or even questioned under Sec. 12.31(b). Franklin v. State, supra; Brock v. State, supra.

Only last spring the court reiterated this well-established principle of Texas law in Burks v. State, 583 S.W.2d 389, 393 - 394 (Tex.Crim.App. 1979):

> In a capital murder case, a prospective juror may be disqualified under either Witherspoon or Section 12.31(b), or both. Bodde v. State, 568 S.W.2d 344 (Tex.Cr.App. 1978); Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976). A prospective juror who is disqualified under Witherspoon need not be disqualified or even questioned under Section 12.31(b) . . .

Thus, respondent's novel construction of §12.31(b) has no basis in Texas law. Indeed, it is directly contrary to the explicit holdings of the Texas Court of Criminal Appeals. Respondent's 11th-hour effort to save the statute on this basis must fail.

B.

Respondent's repeated assertion that §12.31(b) somehow helps the defendant, rather than operating as an impermissible broader basis for excusion than is permitted by Witherspoon, is highly disingenuous. By definition, a broader basis for exclusion is present when venire members who could not have been excluded under Witherspoon are nonetheless excluded under §12.31(b). Respondent's own analysis of the record so much as admits that in this case venire members Williams, McDonald, Mahon, Jenson and Coyle could not have been excluded under Witherspoon. Brief for Respondent 56. Thus, they were not in need of any "rehabilitation" pursuant to §12.31(b). The statute was used to exclude them -- not to rehabilitate them. Section 12.31(b), by disqualifying them merely because they would be "affected" by the possible imposition of the death penalty, therefore served as the very sort of broader basis for exclusion that Witherspoon explicitly forbids.

II.

Respondent's brief repeatedly ignores the actual text of §12.31(b), which requires exclusion for cause merely if a prospective juror is unable to swear that he or she will not be "affected" in factual deliberations by the prospect of the death penalty. The statute does not require that such affectation amount to a disposition to answer the three punishment questions "untruthfully", "dishonestly", "unfairly" or in a "biased" manner. [1] But

[1] The Court of Criminal Appeals has pointedly rejected efforts to construe (continued)

nearly every description of the statute by respondent employs the above sort of terms rather than the word actually used in the statute: "affected".[2]

This case must be decided on the basis of §12.31(b) itself, not upon some different statute conjured up by the State in the hope that alternative language might pass constitutional muster. Under §12.31(b), prospective jurors may be excused for cause solely because they cannot swear that they will not be "affected" by the prospect of the death penalty. That is all the statute requires -- nothing more; and that is all the statute permits.[3] Because that basis for exclusion clearly is in conflict with Witherspoon, the statute cannot stand.

Conclusion

For the reasons stated herein and in the Brief for Petitioner, previously filed herein, the sentence of death imposed upon the petitioner should be reversed and the cause should be remanded for further proceedings.

Respectfully submitted,

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the word "affected", as used in §12.31(b), in such a limited fashion. In O'Bryan v. State, 591 S.W.2d 464, 471 (Tex.Crim.App. 1979), the court said that "[t]he fact that [a prospective juror] stated that he could truthfully answer the special issues submitted at the punishment hearing pursuant to Article 37.071" was unavailing to a claim that such juror was improperly excused under Witherspoon. And in Hovila v. State, 562 S.W.2d 243, 247 (Tex.Crim.App. 1978), the court said: "Section 12.31(b) does not disqualify prospective jurors on the basis of whether or not they can state under oath they will answer the fact questions truthfully. This provision disqualifies those jurors who cannot state under oath that the mandatory penalty of death

(continued)

(footnote continued from preceding page)

or life imprisonment would not affect their deliberations on any issue of fact."

Whether a prospective juror swears he will answer the three punishment questions "truthfully", "honestly", "fairly" or in an "unbiased" manner is totally irrelevant to the issue of whether the juror is subject to exclusion under §12.31(b).

[2] See, e.g., Brief for Respondent, 34: " . . . the oath requires him in effect to swear that he will not lie at either stage of trial and dishonestly answer fact questions . . . "

[3] See n. 1, supra. The holdings in O'Bryan and Hovila, cited in n. 1, completely undermine the respondent's reliance upon Lockett v. Ohio, 438 U.S. 586 (1978). See Brief for the Respondent 59 - 61.

CERTIFICATE OF SERVICE

I, Melvyn Carson Bruder, counsel for the petitioner and a member of the Bar of this Court, hereby certify that I have served one copy of the foregoing Petitioner's Reply Brief upon counsel for the respondent, Doug Becker, by forwarding the same to him in care of the Clerk of this Court along with the copies of the foregoing Petitioner's Reply Brief forwarded to the Clerk of this Court for filing, by prior agreement with Mr. Becker.

_____

MELVYN CARSON BRUDER